SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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A.J. MCNULTY & COMPANY, INC.,

Plaintiff,

-against-

EMPIRE OUTLET BUILDERS LLC, ST. GEORGE OUTLET DEVELOPMENT LLC, DONALD CAPOCCIA, BRANDON BARON, JOSEPH FERRARA, and BFC PARTNERS, L.P.,

Defendants.

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DECISION AND ORDER
Index Number 655727/2018

Mot. Seq. No.: 001

O. PETER SHERWOOD, J.:

Defendants Empire Outlet Builders LLC (Empire), St. George Outlet Development LLC (St. George), Donald Capoccia (Capoccia), Brandon Baron (Baron), Joseph Ferrara (Ferrara), and BFC Partners, L.P (BFC) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the verified complaint (Complaint) as against S. George, Capoccia, Barron, Ferrara and BFC, and to dismiss the third, fifth, and sixth causes of action as against Empire. Plaintiff cross-moves for an order directing that defendants' "Standby Completion Guaranty" (Guaranty) be construed to provide the protections afforded under New York Lien Law § 5, and permitting plaintiff to amend its complaint to assert a cause of action as a third-party beneficiary of the Guaranty, or in the alternative, directing defendants to provide a New York Lien Law § 5 bond or other undertaking.

Empire was the general contractor for a project to construct the Empire Outlets of Staten Island, a private project to be built on land owned by nonparty the City of New York. Plaintiff subcontracted to perform all retail steel construction and installation, and to perform all related

subcontract work in return for the payment of an adjusted sum of $10,729,213.83. Plaintiff alleges that, although Empire accepted plaintiff's work, it paid plaintiff only $8,915,700.07, leaving a balance of $1,813,513.76 owing. In addition, plaintiff alleges that it provided certain trucking services outside of its subcontract, for which plaintiff contends it should have been paid $23,298.

The Complaint alleges the following six cases of action: (1) breach of contract, (2) account stated, (3) quantum meruit, (4) account stated regarding trucking services, and (5) and (6) claims under New York Lien Law § 5. The first four causes of action are alleged against Empire alone. The fifth and sixth are alleged against all defendants.

Lien Law § 5 provides, in relevant part,

> "Where no public fund has been established for the financing of a public improvement with estimated cost in excess of two hundred thousand dollars, the chief financial officer of the public owner shall require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking guaranteeing prompt payment of moneys due to the contractor, his or her subcontractors . . . in the prosecution of the work on the public improvement."

This case came about because the City of New York, the public owner, contracted, as it routinely does, with nonparty New York City Economic Development Corporation (NYCEDC) to enter into the contract for the construction with the general contractor, and either chose not to comply, or neglected to comply, with the Labor Law § 5 mandate. Accordingly, plaintiff remained unable to place a mechanic's lien on the City-owned property, as was the case before Section 5 was enacted, while also being rendered unable to benefit from Section 5's mandatory provision requiring public owners to see to it that an undertaking is posted guaranteeing payments to contractors and subcontractors.

The Guaranty is part of the contract entered into by Capoccia, Baron, and Ferrara on one side, and the City of New York on the other. It provides that "[t]he provisions of this Guaranty are for the benefit of the City and its successors, transferees and assigns." Rosenthal affirmation, exhibit A, ¶ 2.3. Accordingly, there is no grounds for plaintiff to claim that it is a third-party beneficiary thereof. Plaintiff relies upon *Navilllus Tile, Inc. v Bovis Lend Lease LMB, Inc.* (98 AD3d 953, 954-955 [2d Dept 2012]), which held that a labor and materials payment bond cannot impose more stringent notice conditions than those required by State Finance Law § 137 (3). Nothing analogous is present here. Nor does *Skanska USA Bldg. Inc. v Atlantic YardsB2 Owner, LLC* (31 NY3d 1002, 1007 [2018]) aid plaintiff. In that case, unlike here, the completion guaranty provided that the private developer shall guarantee the payments that would be owed to the subcontractors. Nor, in this regard, is the court free to read into Section 5 a requirement that developers of projects on public land guaranty payments to contractors and subcontractors. The Legislature could easily have so provided. It chose, instead, to require the public owner to take action. Accordingly, the fifth and sixth causes of action must be dismissed, and plaintiff's request for declaratory relief against St. George, requiring that it post an undertaking, must be denied.

By letter sent well after all briefs were served, plaintiff submitted a copy of the contract between NYCEDC and St. George. That contract, which requires St. George to submit to NYCEDC certain payment and performance bonds has no bearing on this action, both because NYCEDC is a not for profit corporation, not a City agency (*Hunts Point Term. Produce Coop.Assn., Inc. v New York City Economic Dev. Corp.*, 36 AD3d 234, 246 [1st Dept 2006]), and because the contract provides, at §18.04, that "[n]o person claiming by, through or under [St. George] shall be deemed a third party beneficiary of this Agreement."

Citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.* (70 NY2d 382, 387 [1987]), which holds that an account stated claim may not be alleged, where a contract governs the issue at hand, defendants argue that the quantum meruit claim is barred by plaintiff's subcontract. However, an account stated may be pled where there is a bona fide dispute about the existence of a contract, or where the contract does not cover the dispute in issue. *American Tel. & Util. Consultants v Beth Israel Med. Ctr.*, 307 AD2d 834, 834 (1st Dept 2003); *see also Veritas Capital Mgt., L.L.C. v Campbell*, 82 AD3d 529,530 (1st Dept 2011) citing *Ellis v Abbey & Ellis*, 294 AD2d 168, 170 (1st Dept 2002). Here, the complaint alleges that Empire requested plaintiff to provide trucking services that were not provided for in plaintiff's subcontract. *See* Complaint, ¶ 29. Consequently, the third cause of action is not being dismissed.

Accordingly, it is hereby

ORDERED that the motion to dismiss of defendants Empire Outlet Builders LLC, St. George Outlet Development LLC, Donald Capoccia, Brandon Baron, Joseph Ferrara, and BFC Partners, L.P. is granted to the extent that the fifth and sixth causes of action alleged in the verified complaint are dismissed and the complaint is dismissed as against defendants St. George Outlet Development LLC, Donald Capoccia, Brandon Baron, Joseph Ferrara, and BFC Partners, LP with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the motion is otherwise denied; and it is further

ORDERED that the cross motion of plaintiff A.J. McNulty & Company, Inc. is denied; and it is further

ORDERED that counsel for the remaining parties shall appear for a preliminary conference in Part 49, Courtroom 252, 60 Centre Street, New York, New York on Tuesday, April 7, 2020 at 10:30 AM.

This constitutes the decision and order of the court.

DATED: March 9, 2020

E N T E R,

O. PETER SHERWOOD J.S.C.